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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN EVANS, Defendant and Appellant.	C080020 (Super. Ct. No. 14F01445)

Defendant Steven Evans appeals his convictions for three counts of assault with a firearm, three counts of discharging a firearm from a motor vehicle at a person, and one count of discharging a firearm from a motor vehicle, with multiple gun enhancements. He contends the trial court erred when instructing the jury, and also that his conviction for discharging a firearm from a motor vehicle (count ten) is a lesser included offense of one of his counts of conviction for discharging a firearm at a person (count seven).

The People agree as to the latter claim of error, and so do we. We reverse the conviction on count ten and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2014, Paul Wilkins, Avvion Caldwell, Davonyae Sellers, and Oscar Morris were in front of an apartment complex selling cocaine. Defendant was with Devontre Lang and Sanjay Prasad. There was a history of animosity between defendant and Wilkins.

Wilkins saw defendant looking at him from the store across the street. Defendant left the store and sat in the passenger seat of a car while Prasad drove. They drove to the front of the apartment complex, where defendant fired a gun multiple times from the car at Wilkins and the others, shooting Caldwell in the back of the head. He then yelled at Prasad to "get the F out of here." The car sped off.

Wilkins and the others then ran toward a nearby church. Defendant arrived at the church in the car. He got out of the car and fired more shots at Wilkins and Sellers, and then got back in the car, yelling, "I got the mother fucker." As police sirens sounded, defendant again fled the scene, driven away in the car.

Defendant testified that he thought he had seen Morris and Wilkins with guns in front of the apartments. He claimed he heard shots fired at the car before he fired back, multiple times. He testified he fired because he was in fear and felt he did not have a choice. As to the second episode of shooting, he claimed that he had seen Wilkins and the others running toward defendant's home with guns in their hands. He got out of the car, ran across the street, and fired a single shot above their heads to stop them from running toward him.

Officers did not find the gun at defendant's apartment, but found a nine-millimeter cartridge in his apartment. They also found spent nine-millimeter shell casings at the apartment complex and the church. A comparison of a partial firing pin impression on the unfired cartridge found at defendant's apartment with a firing pin impression on the casing found outside the apartment complex showed the same firing pin could have produced both impressions.

An information charged defendant with premeditated attempted murder (Pen. Code, §§ 664/187, subd. (a)--counts one-three),[1] assault with a firearm (§ 245, subd. (a)(2)--counts four-six), discharge of a firearm from a motor vehicle at a person (§ 26100, subd. (c)--counts seven-nine), and discharge of a firearm from a motor vehicle (§ 26100, subd. (d)--count ten). The information also alleged enhancements for personal use and intentional discharge of the firearm, and inflicting great bodily injury. (§§ 12022.53, subds. (b), (c) & (d), 12022.5, subds. (a)(1) & (d), 12022.7, subd. (a).)

A jury found defendant guilty on counts four through ten and found the corresponding enhancement allegations true. The jury could not reach verdicts on counts one through three and the trial court declared a mistrial as to those counts. The court sentenced defendant to the low term of three years in prison on count seven, as well as 25 years to life in prison on the personal and intentional discharge of a firearm causing great bodily injury enhancement attached thereto, for the shooting of Caldwell. The court added one year each, consecutive, for counts five and six, the assaults on the other two men, as well as three years four months for each of the corresponding gun enhancements, consecutive, for an aggregate determinate term of 11 years eight months. The court stayed sentence on counts four, eight, nine, and ten, pursuant to section 654. Defendant timely appealed.

DISCUSSION

I

Defendant claims the trial court prejudicially erred by instructing the jury that flight after a crime may be considered as evidence of guilt. (CALCRIM No. 372.) He argues that because he was a *passenger* in the car, rather than the driver (who sped away from both shooting scenes), and because he admitted he was present and involved in the

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[1] Further undesignated statutory references are to the Penal Code.

shooting, his flight was not relevant to any contested issue. He adds that because the only issue left for the jury to decide was his mental state, the pattern flight instruction did not apply and actually buttressed the prosecution's case.

Over objection, the trial court instructed the jury pursuant to CALCRIM No. 372 as follows: "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Our Supreme Court has repeatedly rejected the argument that a flight instruction is improper when the only disputed issue is the defendant's mental state at the time of the crime. (*People v. Boyce* (2014) 59 Cal.4th 672, 690-691; *People v. Smithey* (1999) 20 Cal.4th 936, 983 [citing and declining to reconsider numerous decisions rejecting contention that flight instruction "should be given only when the identity of the perpetrator is disputed, and not when the principal disputed issue is the defendant's mental state at the time of the crime"].)

Defendant's related argument that the flight instruction is an "impermissibly argumentative pinpoint instruction[] that allow[s] juries to draw improper inferences of guilt . . . has [also] been repeatedly rejected." (*People v. McWhorter* (2009) 47 Cal.4th 318, 377 [addressing predecessor CALJIC No. 2.52 flight instruction]; *People v. Avila* (2009) 46 Cal.4th 680, 710 ["flight instruction does not create an unconstitutional permissive inference or lessen the prosecutor's burden of proof, and is proper"]; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181 [rejecting arguments that CALJIC No. 2.52 flight instruction is improper pinpoint instruction and impermissibly argumentative].)

Accordingly, we also must reject these arguments. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

"An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." (*People v. Crandell* (1988) 46 Cal.3d 833, 869.) A flight instruction is proper when the defendant's actions "logically permit[] an inference that his movement was motivated by guilty knowledge." (*People v. Turner* (1990) 50 Cal.3d 668, 694; see *People v. Visciotti* (1992) 2 Cal.4th 1, 60 [flight requires a purpose to avoid observation or arrest].)

Here, there was evidence that after the first shooting defendant yelled to the driver to "get the F out of here." The car then sped off. After the second shooting, defendant again rode away with the others as police sirens sounded nearby. While defendant's flight *may* not have been due to his consciousness of guilt in one or both instances, it certainly was not unreasonable to instruct the jury as to its *possible* relevance in determining whether defendant's claim of self-defense was well taken.

In any event, any error was clearly harmless. As our Supreme Court has repeatedly held, CALCRIM No. 372 assumes neither defendant's guilt nor his flight. (*People v. Visciotti, supra,* 2 Cal.4th at pp. 60-61; see *People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183.) Thus if, as defendant contends, there was little evidence of flight, the instruction had no application by its own terms. Accordingly, any error in giving the instruction was not prejudicial.

II

Lesser Included Offense

Defendant next contends his conviction in count ten must be reversed, as it was a lesser included offense of count seven. The People concede the error.

In count ten, defendant was convicted of discharging a firearm from a motor vehicle at Caldwell. (§ 26100, subd. (d).) In count seven, defendant was convicted of

discharging a firearm from a motor vehicle and personal discharge of a firearm causing great bodily injury to Caldwell. (§§ 26100, subd. (c), 12022.53, subd. (d).)

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." ' " (*People v. Reed* (2006) 33 Cal.4th 1224, 1226-1227.) However, where multiple convictions for the same offense include a crime and its lesser included crime, multiple convictions are prohibited. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) A crime is a necessarily included offense of the greater offense if the greater offense cannot be committed without also necessarily committing the lesser offense. (*Ibid.*) "Two tests have traditionally been applied in determining whether an *uncharged* offense is necessarily included within a charged offense--the statutory or legal 'elements' test and the 'accusatory pleading' test. 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.' " (*People v. Sloan* (2007) 42 Cal.4th 110, 117.)

However, the accusatory pleading test does not apply in deciding whether multiple convictions of *charged* offenses are proper. (*People v. Sloan, supra,* 42 Cal.4th at pp. 117-118, italics added.) In those cases, such as this one, we apply the elements test. The statutory elements of section 26100, subdivision (c) (count seven) are: 1) willfully and maliciously discharging a firearm; 2) from a motor vehicle; and 3) at another person other than an occupant of a motor vehicle, here Caldwell. The statutory elements of section 26100, subdivision (d) (count ten) are: 1) willfully and maliciously discharging a firearm; and 2) from a motor vehicle. The enhancement makes clear that Caldwell was the named victim of count ten as well. Accordingly, count seven contains all the

elements of count ten and names the same victim. Count ten was a lesser included offense of count seven and must be reversed.

DISPOSITION

Defendant's conviction on count ten is reversed. The judgment is otherwise affirmed.

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Renner, J.